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Supreme Court of the United States

OCTOBER TERM, 1940

No. 463

CHARLES J. WOLFE,

Petitioner,

vs.

C. F. MURPHY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Charles J. Wolfe, respectfully petitions for a Writ of Certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Eighth Judicial Circuit sustaining the Order of the District Court of the United States in and for the Northern District of Iowa and thereupon show and state to the Court as follows:

I.

STATEMENT OF MATTER INVOLVED

All of the events mentioned herein took place in Iowa, but during all of the times mentioned in the Complaint, plaintiff was, and now is, a resident of Minnesota.

The facts in the case are set forth in the Memorandum Opinion of the Court below (R. 16), and are as follows:

> "A civil action for damages for malicious prosecution. The complaint alleges that on May 10, 1932, defendants with another having maliciously conspired to cause complainant to be charged, arrested and prosecuted for the crime of libel, maliciously filed three separate informations before a justice of the peace charging complainant with the crime of libel and caused said justice to issue a warrant under which complainant was arrested and imprisoned on the 11th day of May, 1932, and held to await the action of a grand jury at the October, 1932, term of the District Court of Iowa for Clayton County. That all defendants appeared before the grand jury, and that the grand jury made a report failing to indict the complainant. The defendants answering plead the statute of limitations as an affirmative defense, alleging that on or about the 20th day of October, 1932, the grand jury of Clayton County, Iowa, made its report, a copy of which is attached to complainant's amended complaint recommending to the Court the discharge of the complainant. That thereupon the District Court entered upon its calendar the following entry: 'Defendant discharged on recommendation of Grand Jury as per written statement on file.' That on October 6, 1937, upon motion of complainant, said District Court of Iowa entered its 'Findings, Order and Judgment of Court,' a copy of which is attached to the defendants' Answer. In such Order the Court finds that the Grand Jury at the October, 1932, term, and on the third day

of said term was empaneled. That complainant appeared in open court and waived challenge to said Grand Jury. That on the tenth day of the term, which was on October 20th, 1932, the Grand Jury made its report and the Court entered upon its calendar the following: 'Defendant discharged on recommendation of Grand Jury as per written statement on file.' The Court further found that during the year 1932 and for some time prior thereto it was the custom of the Clerk to make no record of a criminal action in which the Grand Jury returned no bill and failed to indict. It appears, therefore, that the only record made by the District Court was the entry upon the Court calendar. The complainant was, however, promptly discharged on the 20th day of October, 1932."

The defendants answered, thus making an issue of much of the allegations in the Amended Complaint, and set up as an affirmative defense the Statute of Limitations of Iowa governing such actions. The Court found that the statute had run, and for that reason held that the questions of fact at issue would not need to be tried on the merits, and therefore dismissed the Complaint.

II.

THE FOLLOWING QUESTION IS INVOLVED:

The effect of a *nunc pro tunc* order issued by the Iowa Court which acted to immediately cut off petitioner's right to bring his action by reason of setting in motion the statute of limitations at a date long preceding the date of such order.

III.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court of Appeals here sought to be reviewed is:

First: In conflict with the applicable and controlling provisions of local law.

Second: Opposed to and in conflict with other decisions of the State Court.

IV.

PRAYER

Petitioner accordingly prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit and the judges thereof, commanding that the Court certify and send to this Court a full and complete record of the transcript and all proceedings of said United States Circuit Court of Appeals in the cause therein entitled, *Charles J. Wolfe, Appellant, vs. C. F. Murphy, et al., Appellees,* No. 11,697, on the docket of that Court for 1940, to the end that the final judgment rendered by that Court in such case may be reviewed and determined by this Court; and

Petitioner further prays that he may have such other and further relief in the premises as to this Honorable Court may seem appropriate and in conformity with the law; and

That the judgment of the United States Circuit Court of Appeals for the Eighth Judicial Circuit in this cause and every part thereof be reversed by this Honorable Court and your petitioner will ever pray.

This is the first application for a Writ of Certiorari in this cause.

CHARLES J. WOLFE,
Petitioner,
BY GEORGE E. WALLACE,
Attorney for Petitioner,
Minneapolis, Minnesota.

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

CHARLES J. WOLFE,

Petitioner,

vs.

C. F. MURPHY, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH JUDICIAL CIRCUIT.

I.

OFFICIAL REPORTS OF OPINION DELIVERED BY THE COURTS BELOW:

The decision of the lower court here sought to be reviewed has not been officially reported. It appears in the certified transcript filed herewith (R.....).

II.

STATEMENT OF JURISDICTION:

Statutes sustaining the jurisdiction of the Court in proceedings to review decisions and judgments or decrees of the Circuit Court of Appeals on certiorari:

Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, Ch. 229, Section 1 (43 Statutes 938), now appearing in U. S. C. A., Title 28, Section 347.

Act of Congress of February 13, 1925, Ch. 229, now appearing as U. S. C. A., Title 28, Section 350 (as amended).

III.

STATEMENT OF FACTS

As the facts have been quite fully reviewed in the appending petition repetition here is unnecessary. Any omitted details will be referred to at the appropriate points in the argument submitted herewith.

IV.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:

(a) In adjudging that "both on grounds of a logical interpretation of Iowa Statutes and on the authority of Iowa decisions, that plaintiff's cause of action for malicious prosecution accrued on October 20, 1932, and that when finally commenced it was barred by the two year statute of limitations. The judgment of the District Court dismissing the case on that ground was right, and it is affirmed."

V.

ARGUMENT

1. Presentation of Facts.

The question which took most of the Court's attention was whether or not the appellant was discharged from custody by an entry on the calendar of the Court, and whether a *nunc pro tunc* order could be entered in the manner in which it was entered. If not, then petitioner should be allowed to try his case on the merits.

Counsel in argument admitted that the calendar is not part of the records of the Court. The Court below found that this was the law of Iowa (R.....). On October 6, 1937, the Iowa Court entered its findings and judgment in the case, which is the only record of the discharge of petitioner (except entry on the calendar which is no part of the record) (R.....).

This action was commenced within two years after entry of the order to correct the record, which was October 6, 1937 (R.....).

2. Nunc Pro Tunc Order Ineffective.

The Iowa judge, on October 6, 1937, issued what appears to be a *nunc pro tunc* order and had it entered in the record as of October 20, 1932, which, if lawful, would cut off appellant's right of appeal.

The Supreme Court of Iowa in the case of *Chariton & Lucas County National Bank vs. Taylor,* 213 Iowa 206, 240 N. W. 740, said:

"The office of *nunc pro tunc* entry is not to make an

order now for then, but to enter now for then an order previously made."

Pacific Co. vs. Pender, 14 Ariz. 673, 134 Pac. 289.
I *Freeman on Judgments*, Section 131.

3. Action Was Not Barred by Statute of Limitations.

The Statute of Limitations therefore began to run October 6, 1937, for a two-year period provided by statute, Code Section 11007, which ended October 6, 1939. This suit was begun, and process was served upon the appellees, C. F. Murphy and F. E. Sharpe, on the 4th day of October, 1939, and on the defendants, M. X. Geske and George B. Richter, on the 5th day of October, 1939, and consequently, the action has been started in time.

This being a case originating in Iowa, appellant takes the position that the decisions of the Supreme Court of that state govern. The rule is laid down in 28 U. S. C. A., Action 725, page 232, Note 111, as follows:

> "In the absence of provisions in the federal statutes expressly regulating the matter, * * * the federal courts will, as a general rule, follow the construction given by the highest court of the state to such a statute."

The Court below erred in not following the decisions of the Supreme Court of Iowa, because it considered an entry by the Iowa judge on his calendar to be a judgment of that Court, whereas as above shown, it is not a record of the Court at all, and a mere nullity.

Defendant should have been discharged by a judgment entered into the record book by the Clerk, and was so discharged on October 6, 1937, by such legal formality. Con-

sequently, he now insists that the statute began to run on that date.

This action was brought for malicious prosecution. The appellant was finally discharged by order of the Iowa Court on October 6, 1937. This action was brought by service of the Summons and Complaint on the defendants on October 4th and 5th, 1937, hence the two-year Statute of Limitations did not run against appellant.

The Statute of Iowa contains specific directions as to the dismissal of criminal actions. Section 14027 of the Iowa Code provides as follows:

> DISMISSAL BY COURT—EFFECT.
>
> "The Court upon its own motion or the application of the County Attorney in the furtherance of justice may order the dismissal of any pending criminal prosecution, the reason therefore being stated in the Order, and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner * * *."

We wish to call the Court's attention to the fact that this statute has not been followed in these proceedings and we are firmly of the opinion that a *nunc pro tunc* order cannot cure the defect.

Section 11582 of the Iowa Code provides as follows:

> JUDGMENTS AND ORDERS ENTERED.
>
> "All Judgments and Orders must be entered on the record of the Court and must specify clearly the relief granted or Order made in the action."

This Statute was not followed by the Iowa Court.

The Grand Jury met on October 20, 1932, but did not indict or discharge the defendant, petitioner herein; the Grand Jury also met on December 7, 1936, February 8, 1937, and

October 4th, 1937, and in each case failed to indict or discharge the petitioner. We are, therefore, firmly of the opinion that petitioner's rights have been trampled upon and that Judgment of the Court below should be reversed and this case returned to the District Court for trial on the merits, because the records of the Court show no discharge of the petitioner until October 6th, 1937. Code Section 13446.

VI.

It is, therefore, respectfully submitted that the Writ here sought should be granted and that upon consideration of the merits, the Order and Judgment of the Circuit Court of Appeals should be reversed.

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CHARLES J. WOLFE, *Petitioner,*

vs.

C. F. MURPHY, ET AL., *Respondents.*

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SUCH RESISTANCE.

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Attorneys for Respondents.

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C. F. MURPHY, ET AL., *Respondents.*

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents C. F. Murphy, M. X. Geske, George B. Richter, and F. E. Sharpe, respectfully resist the petition herein for a Writ of Certiorari to review the judgment and decree of the United States Circuit Court of Appeals of the Eighth Judicial Circuit and show the Court that no question of local law has been decided by said Circuit Court of Appeals in any way in conflict with applicable local decisions but on the contrary the decisions both of the United States District Court for the Northern District of Iowa and the Circuit Court of Appeals of the Eighth Judicial Circuit herein were strictly in accordance with the local law and with the statutes and decisions of the State of Iowa.

Petitioner as plaintiff brought this action against respondents as a civil action for damages for alleged malicious prosecution. Defendants interposed a plea of the Stat-

ute of Limitations. The events upon which plaintiff predicates his case took place in the year 1932. He was arrested in the summer of that year upon informations sworn to before a Justice of the Peace and was bound over to await the action of the grand jury in October of that year.

At the October term the grand jury made a report to the Court which returned no indictment but recommended that the proceedings be deferred and defendant released from custody. The state Court made an order on its trial calendar to that effect directing "Defendant discharged on recommendation of grand jury as per written statement on file." The Clerk of the Court never entered the judgment of dismissal but defendant was in fact discharged from custody and no further proceedings had.

Approximately five years later the petitioner filed a motion in the state Court asking that Court "to correct the record * * * and investigate all the procedure relative to the above entitled cause and make a finding and determination in accordance with the actual facts and the conclusions to be drawn therefrom."

Upon that motion the state Court made a finding of facts substantially in accordance with what we stated above and a finding and determination of law to the effect that the action of the grand jury, together with the entry of the Court, was to completely discharge the defendant in that proceeding and the Court further found as a matter of law that there was no action pending against said defendant (petitioner herein).

It is true the Court also made what was in effect a *nunc pro tunc* order which commanded that the entries which he had made on his calendar in 1932 be placed upon the permanent record of the Court.

Defendants in the trial below and in the Circuit Court of Appeals made two contentions:

(1) That the petitioner Wolfe was in fact discharged in October, 1932 by virtue of the fact that the grand jury to which he was bound over failed to indict and the Court at that time failed to continue his case to a later grand jury and no later grand jury ever assumed to act or had any power to act in the premises. See:

Code Sections 13722 and 14023; also
State v. Brown, 102 N. W., 799; 128 Iowa, 24.
Rector v. Smith, 11 Iowa, 302.

(2) That the decision by the state Court on October 6, 1937, made upon petitioner's own motion as defendant in the proceedings in the state Court was significant for two reasons:

(a) As a *nunc pro tunc* order to correct the record and make it speak the truth as to just exactly what occurred on the earlier date, towit, Oct. 20, 1932. See:

Chariton & Lucas County Nat'l Bank v. Taylor, 213 Iowa, 1206; 240 N. W., 740.
34 Corpus Juris, 74 (Title "Judgments", § 213).
Locher v. Livingston, 168 Iowa, 457; 150 N. W., 614.
Doughty v. Meek, 105 Iowa, 16; 74 N. W., 744.
Day v. Goodwin, 104 Iowa, 374; 73 N. W., 864.
34 Corpus Juris, 81, 82 (Title "Judgments", § 222).
Mahaska County v. Bennett, 150 Iowa, 216; 129 N. W., 838.

(b) As an adjudication of that court having jurisdiction of the parties and of the subject matter and acting upon Wolfe's own motion asking that the Court "investigate all the procedure relative to the above entitled cause and make a finding and determination in accordance with the actual facts and the conclusions to be drawn therefrom."

Respondents respectfully urge that the Court disallow the Petition for Writ of Certiorari.

Respectfully submitted,

C. F. MURPHY,
M. X. GESKE,
GEORGE B. RICHTER,
F. E. SHARP,

By G. E. LYONS,
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Attorneys for Respondents.

Supreme Court of the United States

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BRIEF IN SUPPORT OF RESISTANCE.

I.

It is assumed that the petition is based on that part of Subsection 4 (b) of Rule 38 of this Court which provides that a writ of certiorari may at the Court's discretion issue where a Circuit Court of Appeals has "decided an important question of local law in a way probably in conflict with applicable local decisions."

Neither the petition nor the brief in support of it makes very clear what "question of local law" has been decided "in a way probably in conflict with applicable local decisions."

The brief specifies what purports to be one error: that the Circuit Court of Appeals erred in adjudging that "both on grounds of a logical interpretation of Iowa statutes and on the authority of Iowa statutes, that plaintiff's cause of action for malicious prosecution accrued on Oct. 20, 1932, and that when finally commenced it was barred by the two year Statute of Limitations" and "that the judgment of the District Court dismissing the case on that ground was right and it is affirmed." Petitioner's Brief, page 7.

II.

Petitioner in his argument (page 8) erroneously says that the question which took most of the Court's attention "was whether or not the appellant was discharged from custody by an entry on the calendar of the Court and whether a *nunc pro tunc* order could be entered in the manner in which it was entered."

This is entirely inaccurate. *No one claimed nor did either the District Court or the Circuit Court of Appeals hold that "the appellant was discharged from custody by an entry on the calendar of the Court."* The defendants at the trial and on appeal contended, and both Courts held, *"that he was discharged by reason of the fact that he was not indicted by the grand jury to which he was bound over and no later grand jury had any right or power in the premises except by the commencement of a new proceeding."*

Again petitioner erroneously states the issue in his petition (Division II, page 3):

"THE FOLLOWING QUESTION IS INVOLVED"

"The effect of a *nunc pro tunc* order issued by the Iowa Court which acted to immediately cut off petitioner's right to bring his action by reason of setting in motion the Statute of Limitations at a date long preceding the date of such order."

As we have already stated it was not the theory of the defendants or the theory of the Courts that the *nunc pro tunc* order was necessary in order to set the Statute of Limitations in operation as of the date of the proceedings in 1932.

The contention of respondents was twofold but neither contention was as stated by petitioner. We desire more particularly to call this Court's attention to the Iowa au-

thorities which sustain the decision of the trial Court which was affirmed by the Circuit Court of Appeals.

(1) Our statutes make it reasonably clear that the grand jury to which a defendant is bound over has but two alternatives in disposing of the case: either to find an indictment when all the evidence taken together is such as in the judgment of the grand jury, if unexplained, would warrant a conviction by the trial jury *(Code Section 13717)*; or

If upon investigation the grand jury refuses to find an indictment it shall return all of said papers to the Court with an endorsement thereon, signed by the foreman, to the effect that the charge is dismissed and thereupon the Court must order the discharge of the defendant. *(Code Section 13722)*.

A later code section provides: when a person is held to answer to a public offense if an indictment be not found against him at the next regular term of the Court at which he is held to answer, the Court must order the prosecution to be dismissed unless good cause to the contrary be shown *(Code Section 14023)*.

We contend that these Code sections have been construed to mean that if the grand jury fails to indict, even though it does not technically report "No Bill," the result is in fact a dismissal of the prosecution unless the Court upon good cause shown directs that the charge be again submitted to the grand jury, in which case the defendant would be continued in custody or on bail until the next term of Court according to the provisions of Code Section 13722. As to the effect of these Code sections where no indictment is found and no technical report dismissing the charge has been returned by the grand jury, see:

State v. Brown, 128 Iowa, 24; Point 5 on page 27.
Rector v. Smith, 11 Iowa, 302.

An examination of these Code sections and these cases we believe will convince the Court that there has been in the instant case no decision of any question of local law in any way in conflict with applicable local decisions and surely not in conflict with general law:

> "Any mode of termination is sufficient (for the purpose of a malicious prosecution action) which constitutes a bona fide and final determination on the merits, or which amounts to such disposition of the proceedings as to render them incapable of being revived, so that proceedings will have to be instituted *de novo*."
>
> 38 Corpus Juris, 440 (Title "Malicious Prosecution," § 89).

> "A failure or refusal of the grand jury to indict, followed by the discharge of the accused, is in general a sufficient determination of the proceedings, although there may be no formal order of discharge by the Court."
>
> 38 Corpus Juris, 443 (Title "Malicious Prosecution," § 94).

(2) Respondents also contended both in the trial Court and in the Court of Appeals that the entry of the state Court made Oct. 6, 1937, was important and significant for two reasons:

(a) It was effective as a *nunc pro tunc* order made by the state Court on Oct. 6, 1937, making of record in that Court what actually transpired on Oct. 20, 1932. This is not the equivalent of saying that the entry made Oct. 6, 1937, gave validity and effect to the transactions of Oct. 20, 1932. Under the decisions in Iowa, as well as elsewhere we believe, the very purpose of a *nunc pro tunc* entry is to correct the record and make it speak the truth. It is peculiarly appropriate in a case where the Clerk has failed to enter the judgment declared by the Court. In our resistance we have cited cases to this proposition. In the case of *Doughty v. Meek*, the Iowa Court was asked to enjoin the

sale of real estate under a general execution, plaintiff claiming there was no valid judgment upon which an execution could issue for the reason that no judgment had actually been entered by the Clerk up to the time the execution was sued out. Upon the trial of the case the Court ordered an entry of judgment *nunc pro tunc* but being of the opinion that no judgment had been rendered prior to that time enjoined proceedings under the writ of execution which had been issued prior to the *nunc pro tunc* entry. The Supreme Court reversed the lower Court and held that the writ of execution was valid just the same as if the entry of judgment had been made at the time when it should have been made. In other words, the judgment *nunc pro tunc proved* that a judgment had in fact been entered at the earlier date. See:

Doughty v. Meek, 105 Iowa, 16.

The other cases cited abundantly bear out the proposition that when the rights of third persons are not involved, as between the original parties a *nunc pro tunc* entry is only a device to make the record show what the Court in fact *did* in the case at the earlier date.

> "Except as to the rights of third parties, a judgment *nunc pro tunc* is retrospective and has the same force and effect, to all intents and purposes, as if it had been entered at the time when originally entered."
>
> *34 Corpus Juris*, 81 (Title "Judgments", § 222).
> *Mahaska County v. Bennett*, 150 Iowa, 216, at p. 219.

In the last cited case the Court also says:

> "Though the minutes in the judge's calendar form no part of the record, they are receivable in evidence in the absence of a record as tending to show the judgment actually rendered." (P. 218).

(b) But the order of the state Court made October 6, 1937, was more than a mere *nunc pro tunc* entry correcting the record. It was an *adjudication* of the legal effect to be given the proceedings of October 20, 1932. It was made upon Wolfe's own motion asking that Court to "investigate all the procedure relative to the above entitled cause and making a finding and determination in accordance with the actual facts and the conclusions to be drawn therefrom." (R. 9) The Court making it had jurisdiction of the persons and subject matter. It was never appealed from. It irrevocably defined the status of the criminal prosecution. It did not terminate that prosecution but held as a matter of law that the prosecution was terminated on Oct. 20, 1932. "The Court finds and determines that the effect of the action of the grand jury, together with the entry of the Court, was to completely discharge the said defendant and thereafter there was no action pending against the said defendant." (R. 11)

It seems clear that under the statutes and decisions of Iowa, as well as under the general rules of law, this petitioner could have commenced his action for malicious prosecution any time after Oct. 20, 1932. The Iowa Statute of Limitations is two years. If his action had been commenced at any time within that period, respondents would have been in no position to contend that his action was premature for the reason that the criminal proceedings against him were still pending.

We realize the merits of the case are not before the Court in this petition for a writ of certiorari but we have deemed it necessary to go into the merits to this extent in order to show that the Circuit Court of Appeals has not "decided an important question of local law in a way probably in conflict with applicable local decisions." We understand that is the sole ground urged by petitioner; in

fact, we know of no other ground which he could urge in favor of the issuance of a writ in this case.

Respectfully submitted,

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